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Introduction

It is well accepted that the proportion of people over the age of 65 will more than double over the next 40 years.

This natural increase in demand will give rise to pressures for the supply of housing, health related services and social networks to support this section of our population. Currently, people approaching retirement age or needing such support, social connection and specialised forms of accommodation are faced with a number of choices. These range from: remaining at home and relying on family or third party providers; modifying their current environment; to specialised forms of housing that provide all these elements.

This paper is intended to provide overseas investors or new entrants an overview of the aged care and retirement village industry in Australia, to understand some of the concepts used in the industry and explain the notions of:

- Retirement villages with serviced apartment or 'user pays' type support services;
- Home and community care services; and
- High care nursing homes.
Retirement villages are regulated by specific state and territory legislation. Most jurisdictions operate by reference to legislation that uses the title ‘Retirement Villages Act’.

Some jurisdictions supplement the operation of the Act with Regulations and others with a Code of Practice (eg Western Australia and Northern Territory). The use of supplemental Codes of Practice is diminishing. The Australian Capital Territory abandoned a Code of Practice in 2013.

Most jurisdictions utilise Regulations to supplement the operation of the Retirement Villages Act.

All jurisdictions review their legislation on a regular basis. The New South Wales legislation was the subject of an amending Act that commenced in March 2010 that changed fundamental aspects of the legislation. Victoria, Queensland and South Australia have made substantial amendments to their legislation since 2006. Victoria announced further amendments to its form of Regulations in 2013 to take effect in 2014. The Australian Capital Territory introduced legislation that mirrors the NSW legislation in 2013. Western Australia issued a list of recommendations in 2010 with a new Code of Practice and form of Regulations issued in 2014.

All jurisdictions emphasise the consumer protection objects of the legislation to provide certainty to residents. All jurisdictions are now moving to a commonality of legislative principles which are tending to increase the prescriptive and standard nature of village contracts and regulation. New South Wales adopted a standard village contract in 2013.

The most common legislation being used as a base for other jurisdictions is the New South Wales and Queensland forms of legislation.

The elements of consumer certainty and protection provided to residents include:

- Registration of the village as a retirement village which means the land cannot be used for other purposes and the contracts on the land are recognised as falling under the legislative regime;
- Statutory charges in favour of residents to protect their ability to be repaid their ingoing contribution following their departure;
- Extensive disclosure obligations; and
- Cooling off rights and settling in periods.
COMMON THEMES AND CONCEPTS

The legislation across all jurisdictions seek to achieve the following broad principles:

- Clarify the rights and obligations of residents and operators of retirement villages;
- Facilitate the disclosure of all important information relevant to a person who is considering entering into a particular retirement village;
- Require contracts to contain full details of the rights and obligations of the parties;
- Facilitate resident input where desired by residents into the management of retirement villages;
- Establish appropriate mechanisms for the resolution of any disputes between residents and operators.

A ‘retirement village’ is broadly defined across the jurisdictions to mean a complex containing residential premises that are predominantly or exclusively occupied by retired persons who have entered into village contracts with an operator of the complex. ‘Retired persons’ is typically defined to mean a person who has reached the age of 55 or has retired from full time employment.

A retirement village does not generally include:

- Part of a complex which is used for residential care by an approved provider or respite care under the Aged Care Act 1997 (Cth);
- A caravan park;
- Premises that is the subject of a lease between the operator and the resident that is a residential tenancy agreement;
- A boarding house or lodging house.

All jurisdictions utilise the following notions and concepts which any prospective operator must understand:

- ‘Operator’ – this refers to a person who manages or controls the retirement village and includes the owner of the land.
- ‘Departure fee’ – also called the deferred management fee. This is the fee paid by a resident to the operator following their departure. It is usually expressed as a percentage of the original or next ingoing contribution.
- ‘Recurrence charges’ – this is the amount payable under a village contract on a recurrent basis, by a resident for the ongoing operation of the village. These are sometimes referred to as maintenance fees.
- ‘General services’ – means the range of services provided or made available, by the operator, to all residents of a retirement village. These services are generally funded by recurrent charges.
- ‘Personal services’ – means optional services provided or made available by or on behalf of the operator, to individual residents of a retirement village. These are sometimes called ‘optional services’ or ‘user pays’ services. Examples include hairdressing, meals, laundry services and the cleaning of resident’s premises.
• ‘Budgets’, ‘statement of approved expenditure’ and ‘statement of proposed expenditure’ – these are statements of what expenditure may be undertaken by the operator funded by recurrent charges. They operate to limit the amount that may be expended by reference to the statements of approved expenditure as opposed to a budget that suggests an ‘estimate’.

• ‘Ingoing contribution’ – This is the amount payable for the right to occupy, but does not include recurrent charges. The ingoing contribution may be made by way of a loan, lease premium, pre-paid rent or other lump sum amount. The form of payment of the ingoing contribution may have income tax implications as being received on income or capital account.

• ‘Village contracts’ or ‘resident contracts’ – these are the contracts that residents enter into to live in a village. They can be made up of one or all of the following forms of contracts:
  – ‘Residence contract’ (the contract that gives the right to occupy);
  – ‘Service contract’ (the contract that gives the right to receive services of either a general nature for all residents in the village or personal services for the particular resident);
  – A contract under which a person gains the right to use a garage, parking space or storage room.

Attention should also be given to the definition of retired persons. This is generally said to mean a person who has reached the age of 55 or has retired from full time employment.

PROSPECTIVE RESIDENTS AND INCOMING RESIDENTS

Residents entering into a village will generally across all jurisdictions, be provided with the following:

1. A form of disclosure document to explain in general terms the contractual framework they are entering;
2. The nature of the village they are to enter and the services to be provided;
3. The forms of contracts they are to enter into.

The form of disclosure statement varies across jurisdictions to the more specific and detailed as in Queensland and the more general in Western Australia.

As mentioned previously however, the degree of disclosure is increasing across jurisdictions.

Residents generally will have a cooling off period to determine if they wish to continue to live at the village. Some jurisdictions incorporate a ‘settling in period’ of 90 days. In any settling in period or cooling off period, all amounts paid by a resident are refundable.
FORMS OF VILLAGE CONTRACTS

Village contracts are the form of the agreement made between an operator and a resident to define the terms upon which a resident resides in the village and their rights upon departure. They act in a manner similar to a typical residential tenancy agreement but differ because retirement villages are a particular form of accommodation that provides additional elements of services, care, hospitality and community to the particular resident and the body of residents as a whole.

There is no typical form of village contract though by operation of the Act and evolution, and especially consolidation of the industry, village contracts do contain common elements and characteristics.

Village contracts define:

1. The payments required to be made by residents upon entering the village – known generally as the ingoing contribution, loan, lease premium or price;
2. Payments to be made during their tenure – these are defined under the Act as the recurrent charges but are also typically called maintenance fees or charges, or levies;
3. Payments to be made to the operator upon the resident's departure from the village – usually called the deferred management fee but also known as the departure fee;
4. The nature of accommodation rights granted to the resident – this could be a lease, license or strata title;
5. The nature and scope of services provided – services may be provided to all residents, in which case they are called 'general services', or may be provided to residents by separate arrangement on a needs or as demanded basis, in which case they may be called 'personal services'; and
6. The right to receive refunds of moneys paid following their departure.

In this regard, it is useful and instructive to consider the nature of the operator as often the corporate form of the operator will give some indication of the likely form of contract to be used. There are different income tax consequences to an operator depending on the type of contract used.

The form of village contract used will be influenced by the operator's own financial objective and mission and to a large degree, income tax and GST considerations.

Where there are higher levels of 'care' or 'health' services provided at a village that form part of the general services, the village will often be described as being a 'serviced apartment'. This is intended to reflect that residents in these villages receive a significant level of personal care type services as part of the 'package of services' they receive when moving into the village. These serviced apartments are taking the place to some large degree of low care residential care services provided in hostels and nursing homes. Where there is more serviced apartment style accommodation provided and the built environment meets certain criteria, there are certain GST benefits that may be achieved.

As nursing homes become more focused on higher levels of care services it is likely the trend towards retirement villages providing the additional services for residents will increase over time.
Accordingly, the different structures used for provision of retirement village accommodation and services can be explained with reference to the following areas:

- The title by which the operator holds the land and can issue occupancy rights;
- The forms of ownership structures used by operators and owners of these villages; and
- The differing levels of care and services that may be provided.

The forms of title used in granting residents the right to occupy can be any of the following:

1. Strata title – where the resident acquires title to the premises;
2. Leasehold – where a lease is granted to the resident;
3. Licence – where a licence right is granted to the resident; or
4. Company title – where a resident will acquire shares in a company which couple with a lease arrangement, will give the resident the right to live in the premises.

**INCOME TAX AND OTHER TAXES**

The general principle is that the ingoing contribution paid by a resident to enter a village is paid in a lump sum, and is a liability held by the operator to repay the amount when the resident departs. That is, the payment is received as a form of capital receipt. Only if the payment is characterised as a lease premium, sale of real estate as part of a business or rent, would the receipt be characterised as income.

The distinction between a payment that is paid as a loan or a lease premium is the subject of income tax rulings and essentially turn upon the question of the clear obligation to repay the loan in a defined period of time.

To compensate the operator for the resident residing in the village, the operator is paid a departure fee by the outgoing resident. The operator and the resident may also share in the capital gain upon a resale of the premises. The capital gain is the difference between the price paid by a resident to enter the village compared to the price paid by the next resident to reside in the same premises.

The departure fee is generally received as income however the share in capital gain may be received as a capital amount as it is paid by a subsequent resident.

When villages are bought and sold, the price paid is generally stated to be net of the loan liability and would reflect the net present value of the future receipts of departure fees and capital gains.
AGED CARE
Aged Care

Aged care services in Australia are predominantly provided by the Federal Government through the *Aged Care Act* 1997 (C’th).

The Aged Care Act commenced in July 1997. Broadly, the aim of the Act is to facilitate funding for the provision of aged care services and to ensure that affordable and quality care is available to older Australians.

Aged care services take the form of either:

1. Residential care services;
2. Home care services; or
3. Flexible care.

Under the Act the Minister can make what are known as Aged Care Principles. The principles cover a wide range of matters which includes ensuring accountability of providers of aged care, monitoring the quality of care delivered by approved providers and providing for the rights of residents.

The principles give a regulatory and administrative structure to the Act.

The object of the Act is:

(a) To provide for funding of aged care that takes account of:
   (i) The quality of the care;
   (ii) The type of care and level of care provided;
   (iii) The need to ensure access to care that is affordable by, and appropriate to the needs of, people who require it;
   (iv) Appropriate outcomes for recipients of the care; and
   (v) Accountability of the providers of the care for the funding and for the outcomes for recipients.

The Act provides a mechanism for the allocation and distribution of federal funds to providers of aged care.

In addition to those provisions of the Act which deal with providing for funding of aged care, the Act creates a regime for the supervision of aged care providers by the Department of Health and Ageing. There are two key pillars of this supervisory regime, they are:

1. That all aged residential aged care facilities which receive federal funding for the provision of aged care be accredited (this is known as the accreditation process); and
2. That, in addition to the accreditation process, all residential aged care facilities must meet the requirements of the Certification Standards to be entitled to ask for accommodation bonds and/or resident fees.

The process of accreditation and certification is administered and monitored by the Aged Care Standards and Accreditation Agency.

The responsibility for regulating and supervising aged care within nursing homes falls under the jurisdiction of the Federal Department of Social Services which administers the *Aged Care Act* 1997.

As well as nursing homes, the Aged Care Act also regulates the provision of home care services. These are care services generally provided to
individuals in their homes, where the service standards are regulated by the Act. There are four levels of care ranging of level 1 which is of a lower care level of services to level 4 which provides services to allow high levels of care including dementia support to be provided to residents in their homes.

In terms of ‘home’, home care packages are provided regularly to residents living in retirement villages. It is sometimes the case that a provider of aged care services including home care services may also be an operator of a retirement village.

GOVERNANCE AND ADMINISTRATIVE

AGED CARE PRICING COMMISSIONER

The Aged Care Pricing Commissioner is established to:

1. Approve extra care service fees; and
2. Approve accommodation payments that are higher than the maximum amount determined by the Minister under s52G-3.

AUSTRALIAN AGED CARE QUALITY AGENCY

The Australian Aged Care Quality Agency (Quality Agency) commenced functions relating to residential aged care services from 1 January 2014 and will commence functions relating to home care services from 1 July 2014 replacing the Aged Care Standards and Accreditation Agency Limited (ACSAA).

The Quality Agency is the agency responsible for the accreditation and monitoring of Australia’s residential aged care providers.

The Quality Agency continues the ACSAA’s work of supporting and promoting quality in aged care service through its industry education program.

AGED CARE SERVICES

The Act defines aged care as follows:

‘Aged care’ means care of one or more of the following types:

- Residential care;
- Home care; and
- Flexible care.

These are the three basic forms of care for which the Federal Government provides funding. The Act defines these three types of care as follows:

1. ‘Residential care’ – in summary, the provision of residential care requires care to be provided in conjunction with the provision of accommodation. It is the delivery of care in the type of setting ordinarily describe as a hostel or a nursing home.

2. ‘Home care’ – this form of care is delivered to a person who is not being provided with residential care ie care provided in a nursing home. Home care involves the provision of personal assistance, such as bathing, showering, diet control, laundry and gardening and is usually provided to a person while they are living at home. Home care is not provided in conjunction with accommodation. Home care can be delivered to a person living in a retirement village.
3. ‘Flexible care’ – the definition of flexible care in the Act is quite broad. Flexible care is care provided in either a residential care or home care setting (that is, it may be provided in a residential care facility or to a person while they are living at home) which addresses a person’s care needs in alternative ways.

The Federal Government also funds in conjunction with two state governments (Victoria and Western Australia) a form of lower level of community care called HACC (Home and Community Care). These are provided primarily for people requiring domestic or personal care at home. In 2011, the Government moved to take greater control of this area of care from the State Governments as part of an overall consolidation of aged care under the single regime administered by the Federal Government. Only Western Australia and Victoria decided not to transfer this responsibility to the Federal Government.

KEY REQUIREMENTS TO RECEIVE FEDERAL FUNDING

Funding under the Act is in fact funding provided for the care recipient and not an allowance for the provider. To receive federal funding for the provision of aged care, the Act sets out certain requirements which must be met.

These elements are:

1. The operator is ‘an approved provider’ – that is they are accredited as such;
2. They hold ‘places’ (issued by the Government) in respect of the particular care services to be provided; and
3. They have identified an approved recipient (that is a person) who has been assessed as being entitled to receive the level and type of care relating to the allocated place.

In summary, the approved provider is the entity responsible for the delivery of aged care and is the entity with which residents contract to enter the facility. It is the entity which receives the funding from the federal government and, if things go wrong in relation to the delivery of aged care (for example, if the quality of care falls below minimum standards or the approved provider fails to maintain its accreditation or certification), it is the entity which is sanctioned by the Department of Health and Ageing.

Applying to become an approved provider can be quite difficult. Once an aged care provider is approved and has commenced delivering care it is supervised by the Department of Social Services, monitored by the Australian Aged Care Quality Agency.

As noted above, if the approved provider fails to meet the requirements imposed on it by the Act, it runs the risk of having a sanction imposed by the Department. The effect of a sanction can be far reaching and critical to an approved provider’s business.
RESIDENTIAL CARE AGREEMENTS

The concept under the Act is that accommodation is separated from the concept of provision of care services.

An approved provider is required to enter into an accommodation agreement and residential agreement with a care recipient for them to occupy a place in a nursing home or hostel, and to provide services within the facility.

The agreement must comply with the elements of such agreements as are prescribed in the Act and the Principles.

The accommodation agreement relates to the terms upon which the resident agrees to enter the facility and pay for the accommodation component of the service. The resident agreement relates to the provision of the care services and the ability for the operator to receive the Federal funding.

The agreements can be and are usually incorporated into the one document.

An approved provider will receive a level of subsidy dependent on the level of care services required by a resident. The level of funding is determined according to an Aged Care Funding Instrument (ACFI).

The cost of care has become more user pays and means tested in nature.

NURSING HOMES

Up to 1 July 2014, residential aged care was categorised as either high care (nursing homes) or low care (hostels). The difference between the two depended upon the level of health related services provided in each.

Nursing homes provide a high level of care and include dementia specific centres. Hostels provide low care services.

The removal of the distinction from 1 July 2014 means that there is now only one form of residential aged care. The level of care in those facilities tends towards the high care level of services.

A resident entering a nursing home is required to pay towards the cost of their accommodation by choosing to pay either:

1. A refundable accommodation deposit (RAD) – which is a lump sum amount, refundable when the resident leaves the facility;

2. A daily accommodation payment (DAP) – an amount that is paid as a daily payment. The DAP is determined as an equivalent amount of the RAD based on a maximum permissible interest rate; or

3. A combination of both a RAD or DAP.

The repayment of accommodation bonds are protected by a guarantee from the Department to be repaid to residents in the event the approved provider were to fall into insolvency.

A nursing home may hold ‘extra services’ status. This allows an approved provider to charge extra fees for the ‘extra services’ provided in that facility.

Independent of the cost of providing for accommodation, residents are required to contribute to the cost of provision of services based upon an assessment of their income and assets. The rules relating to the ability to charge a resident fee for the provision of care are extensive and contain elements of means and assets testing and verification.
Residents are required to contribute to their residential care (in addition to basic daily fees and other amounts agreed) to a maximum of $25,000 per annum to a lifetime limit of $60,000.

REFUNDABLE ACCOMMODATION DEPOSITS AND DAILY ACCOMMODATION PAYMENTS

The basis upon which an approved provider may determine the levels of RADs to be charged to care recipients is set out in the Fees and Payments Principles 2014 issued on 28 January 2014.

The Fees and Payments Principles are in three parts:

1. Establishment of the Principles themselves – commencing 31 January 2014;
2. Rules about charging accommodation payments – commencing 1 July 2014; and
3. Approval of higher maximum accommodation payments – commencing 31 January 2014.

The maximum accommodation payment has been set at $550,000 as at 31 January 2014.

RULES

Part 2 of the Principles sets out the obligations on approved providers to:

1. Publish information about maximum accommodation payments; and
2. Determine the equivalence between a provider’s refundable accommodation deposit (RAD) amount and daily accommodation payment (DAP) amount.

The information to be published includes:

1. A statement as to the accommodation features;
2. The maximum accommodation payment that could be charged for that room or part of the room;
3. Information as to the options to pay for that room; and
4. At least one example of how that room could be paid for by a combination of RAD and DAP.

The information will need to be:

1. Published on the approved provider’s website (if they have one);
2. Given to the Secretary for publication by the Secretary; and
3. Included in written material to be given to prospective residents.

An approved provider who seeks to charge an accommodation payment above the maximum permissible amount must make an application to the Aged Care Pricing Commissioner.

An approved provider who seeks to charge an accommodation payment up to the maximum amount does not require the consent of the Aged Care Pricing Commissioner.

The equivalence between the RAD and DAP is determined first by reference to the RAD to be charged by the approved provider. From the RAD, the daily accommodation payment amount calculator is applied. This calculator requires the approved provider to:
1. Work out the maximum permissible interest rate (MPIR) (being the general interest charge rate under the Taxation Administration Act on a daily basis, multiplied by the number of days in the year less three (3) percentage points);

2. Multiply the MPIR to the RAD; and

3. Divide the amount by 365.

At January 2014 for a RAD of $550,000 the equivalent DAP is $99.57 per day.

APPLICATIONS FOR HIGHER LEVELS OF RADS

Applications to the Aged Care Pricing Commissioner:

- Are not required for RADs below the maximum accommodation payment;
- May be made from 31 January 2014 and following approval, may be published from 19 May 2014;
- May be for rooms or parts of rooms, of the relevant service;
- Must be made on the approved form;
- Will be determined within 60 days;
- May not be reassessed for a period of four months;
- Continue for four years; and
- Can be indexed during the approval period.

The process for assessment requires the Aged Care Pricing Commissioner to consider a number of factors, including:

- Location of facility;
- The maximum accommodation amount to be charged;
- Quality, condition, amenities;
- Design features;
- Number of occupants; and
- Additional services.

Separately, the Aged Care Pricing Commissioner may consider the cost of providing the accommodation and any other relevant matter.

Approvals can be given subject to conditions.

From October 2011, accommodation bonds as they were then known, are now called bonds and as a result RADs in the future can only be used for permitted purposes that relate to capital expenditure relating to the provision of aged care services, associated loans for such permitted uses, or other defined permitted uses. They carry a significant amount of regulation in relation to reporting and liquidity obligations.
HOME CARE

Residents receiving home care are required to enter into home care agreements. These agreements will specify the range and cost of services to be provided. The agreements utilise the consumer directed care principles to allow the recipient to determine the nature of services they are to receive.

People receiving home care services are also required to contribute to their care costs.

The assessment of costs is determined by an assessment of a person’s income.

The maximum amount that can be contributed towards care costs is $10,000 per annum, less for pensioners, to a lifetime maximum of $60,000 per annum.

The lifetime maximum is transferable across home care and residential care.

CONSUMER DIRECTED CARE

Home care services are delivered on the basis of Consumer Directed Care (CDC) principles.

CDC operates on the principle that care recipients will receive a budget for the provision of their care needs and will be able to determine:

- The nature of the services to be provided;
- The goals to be achieved;
- The delivery of those services;
- Who is the provider; and
- The timing of the delivery.

The budget developed in relation to the care recipient is divided into three components:

1. Administration costs – reflecting establishment costs for the organisation including the cost of meeting Government accountability requirements;
2. Core advisory and case management services – relating to care planning, reviews and reassessments; and
3. Service and support provision and purchasing – the direct costs of service provision.

A contingency component can be included in the budget.

The budget is transportable within packages to a provider but if a care recipient moves, the unspent budget may remain with the provider.

The approved provider, being essentially the facilitator of the services, will receive a portion of the budget for the administration of the service.

The framework for consumer directed care is dealt with in the Home Care Packages Program Guidelines issued in August 2013.

It is proposed that the CDC principles will be applied to residential care services from 1 July 2015.
CONCLUSION

This paper does not set out all of the items or the issues. It is a guide of the most important aspects and provides an overview of the legislative framework. It remains of utmost importance that the terms of the contract correctly reflect the intention of the parties.

Reference must still be made to the Regulations and the Act to ensure compliance as well as obtaining advice as to its operation in the context of particular village contracts.

Failure to comply with the legislation carries financial penalties; however residents are permitted the opportunity to make an application to avoid incurring any obligations in relation to recurrent charges and expenditure.

It is also important to obtain specific income tax and indirect tax advice as to the operation of a facility and any proposed acquisition or disposal.

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Arthur has appeared in all courts and tribunals relevant to the industry and acted for operators in some of the most significant cases affecting the industry.

He regularly addresses and advises the peak industry bodies as to changes in legislation and developments in the law.